STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2005
v	No. 250821 Kent Circuit Court
XAVIER DELFONTAY MILTON, a/k/a XAVIER DELFANTAY MILTON Defendant-Appellant.	LC No. 02-007428-FC

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, assault with intent to commit armed robbery, MCL 750.89, first-degree home invasion, MCL 750.110a(2), and felony-firearm, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two years' imprisonment for the felony-firearm conviction to run consecutive to concurrent terms of twenty to fifty-two and one-half years' imprisonment on each of the other convictions. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand in order for the trial court to vacate that portion of the judgment of sentence that orders "additional restitution for value of jewelry."

Defendant first argues that the trial court erred in denying his *Batson*[1] challenge. It is impermissible for a prosecutor to exercise peremptory challenges to strike potential jurors solely on the basis of their race, gender, or ethnicity. *Kentucky v Batson*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Under *Batson*, the United States Supreme Court set forth a three-step analysis to determine whether the prosecutor violated the equal protection clause in utilizing peremptory challenges. In *Purkett v Elem*, 514 US 765; 115 S Ct 1769; 131 L Ed 2d 834 (1995), the United States Supreme Court outlined the *Batson* framework.

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a

[1] *Kentucky v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

> race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."
>
> * * *
>
> It is not until the third step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. [*Id.* at 767-768 (emphasis omitted) (internal citations omitted).]

A trial court's ruling on a *Batson* challenge is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 548; 575 NW2d 16 (1997). Defendant argues on appeal that, under the circumstances of this case, the court should have made an inference of per se racial discrimination.

Before the jury was sworn, defendant objected to the prosecutor's use of two peremptory challenges to dismiss two African-American women, Shanta Harris and Denise Love, the only African-Americans in the jury venire. The prosecutor responded that, regarding Harris, she had initially challenged Harris for cause because of her uncertainty of being able to convict a person based on testimonial evidence alone. The prosecutor explained that although she withdrew her challenge after the court spoke to Harris, she had "strong concerns" about Harris' ability to evaluate the evidence fairly because "this case is 100 percent testimony, no physical evidence" and thus, used a peremptory challenge to remove Harris from the jury panel. The prosecutor also based her dismissal on the fact that Harris had a prior conviction for malicious destruction of property and had been on probation for it within the last two years in Kent County. As to potential juror Love, the prosecutor explained that her concerns were that Love stated she was not sure she could always be fair, she had many family members who had adverse contacts with the police in the Grand Rapids area, and she believed her brother was treated unfairly by the system when he was convicted in Kent County.

Defendant suggests that the prosecutor's reasons are disingenuous because both jurors stated, in the end, that they could be fair. And other jurors who initially expressed concern over their ability to serve were not removed. Defendant stated that he could not "get into the prosecutor's head and know what she was thinking." But based on the result of the prosecutor's peremptory challenges, defendant asserts that this is a classic case where an inference of discrimination should be made because "the prosecutor's rationale for excusing [Harris and Love] was simply not credible." Below, the court noted that the prosecutor offered race-neutral reasons for excusing Harris and Love and stated it found these reasons to be "plausible and sufficient."

Although other potential jurors' responses may have raised warning flags, the degree of the prosecutor's concern was a subjective matter. And this Court defers to the trial court's evaluation of the prosecutor's state of mind based on demeanor and credibility. An appellate court must give great deference to the trial court's findings on a *Batson* issue because they turn in large part on credibility. *Howard, supra* at 534. The decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal, which will not be overturned unless clearly erroneous. *Miller-El v Cockrell*, 537 US 322, 339-340; 123 S Ct 1029; 154 L Ed 2d 931 (2003). The prosecutor's proffered reasons regarding Harris were reasonably related to issues in the case, given that there was no physical evidence to present. As to Love, the prosecutor stated legitimate concerns regarding Love's ability to fairly assess the government's evidence. We cannot conclude that the trial court clearly erred in finding that these reasons, though subjective, were plausible race-neutral explanations. Therefore, we find that the trial court did not abuse its discretion in denying defendant's *Batson* challenge.

Defendant also argues that he was denied a fair trial when the prosecutor invoked a "civic duty" argument during her closing argument. Defendant further argues that the prosecutor unfairly shifted the burden of proof to defendant during her rebuttal closing argument. Because defendant did not object at trial to either of these remarks, we review only for plain error affecting defendant's substantial rights.[2] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).

Defendant objects to the following argument made by the prosecutor. After noting that the victims in this case very reluctantly testified at defendant's preliminary examination and were eager to complete their involvement, the prosecutor stated:

> Is that it? We're done. We've identified the guy. That's him. I mean, heck, they're packing their bags the next day according to the detective. They want out of there. They don't want anything else to do with this and especially not to do with him [defendant].

[2] Contrary to plaintiff's assertion in its appellate brief, our Supreme Court in *People v McNally*, 470 Mich 1; 679 NW2d 301 (2004), did not hold that "a reviewing court should not reach a forfeited constitutional issue if the court determines that the error could not have been reversible." Rather, the Court noted that the plain error standard enunciated in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), applied, and that even if there was error, reversal was not required unless it affected defendant's substantial rights, i.e., the error was outcome-determinative. *McNally, supra* at 5-6. In *McNally*, our Supreme Court did not address whether the prosecutor's conduct was error. Instead, the Court skipped to whether the conduct, even if it was error, affected the outcome of the trial. *Id*. at 5-6. And Justice Weaver criticized this analysis in her separate opinion. *Id*. at 8. Justice Weaver disagreed with the majority's approach of evading the merits of the issue by first addressing whether the alleged error was harmless. *Id*.

> Then we victimize them. Me, the detective, the system, because now we have to say to them, get in here, you got a subpoena, you have to testify, this is the trial. You have to tell the truth, you have to come in here and do this.
>
> And they want nothing to do with it. So much so that we have to arrest them, and that is not something that me or the Court or the detective or anybody want to do ever with a victim or witness, *but the law allows that because otherwise you will—we encourage people like him to keep doing what he's doing. Then the fear and intimidation and the street law works.*
>
> So we have to force them to come in here. Gary Jackson spends a night in jail. We pull him out of his house, and he comes in here and tells you what he remembers as best as he can nine months later.
>
> Jonetta Cann comes in here. We stick her in jail for two nights because we don't get to her. We finish with Gary Jackson, and then we have to come back the next day and put her on. She's away from her kids and her home and everything she knows for two nights, sleeping in jail, when she did nothing wrong, other than not voluntarily come down here.
>
> *It's not right. It shouldn't have to happen. The alternative is you let him loose. He wins. You continue to encourage the fear and intimidation and you tell him it works. So we couldn't.* [Emphasis added.]

Defendant contends that the emphasized portions of the prosecutor's comments constituted an impermissible "civic duty" argument.

A prosecutor may not urge the jurors to convict the defendant as part of their civic duty because it unfairly "places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments." *Abraham, supra* at 273. Reviewing the prosecutor's remarks in context, it is clear that the prosecutor was simply explaining why there might have been inconsistencies in the victims' testimony and why the victims may have appeared to be less than forthcoming, because they were afraid of defendant. So much so that they had to be arrested as material witnesses in order to assure their testimony at trial. The prosecutor never suggested that the jury should base its decision on anything other than the evidence presented at trial. We find that defendant has not demonstrated plain error. *Carines, supra*.

Defendant further argues that the prosecutor unfairly shifted the burden of proof to defendant during her rebuttal closing argument. The prosecutor began her rebuttal by reminding the jury of the defense attorney's initial statements in his closing argument, which attacked the victims' credibility based on their lifestyles, and then she remarked:

> Well, how did they know this guy [defendant]? You had both these victims on the stand. You ask them pretty much what you want to within the rules, and you never say—I mean, he's representing him.

> They talk, they sit together, and see all the witnesses. If there's some reason why that you should know that they know this guy from some other arena or some other relationship, then ask them, right? Say, isn't it true that you've bought drugs from this guy for years or you've been selling drugs to this guy for years and he screwed you over and you're getting him back? Whatever the story.
>
> By golly, when you have him up there, ask him. They might deny it, but at least you asked him. If there is some evidence that they have a prior relationship, we want to know. We are not here to convict someone who didn't do it. We're here for the truth and, *if the truth is they knew it and had a reason to make this up, then tell us. Then at least show that there is something more out there. Give the jury some evidence. Don't just stand up here and say, don't they know him? They know him. That is not evidence. It's complete speculation, because that's the only shot he has of getting off.*
>
> If you label these victims and pigeonhole them and say they must be involved in drugs or there must be something else here, that's the only way he gets off. [Emphasis added to specific portion from which defendant objects.]

The prosecutor continued her rebuttal argument arguing that any past transgressions, real or alleged, by the victims did not change the fact that breaking into someone's house and robbing the occupants at gunpoint was illegal.

Defendant argues that the prosecutor's comments suggested that defendant had some burden to produce evidence in this case. We disagree. A fair reading of the prosecutor's rebuttal argument indicates that the prosecutor was calling into question the validity of defendant's defense. At trial, defendant appeared to argue that there may have been another reason as to why the victims were testifying against defendant and sought to impeach their credibility based on alleged drug activity and out-of-wedlock births. The prosecutor's rebuttal argument should be considered in light of defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003). And a prosecutor may comment in closing argument on the credibility of his own witnesses, especially where the defendant's guilt rests on which testimony the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). We find that the prosecutor properly addressed defendant's challenge to the victims' credibility. Because defendant has not demonstrated plain error, we decline to address defendant's argument pertaining to the cumulative effect of these alleged errors and his ineffective assistance of counsel claim regarding defense counsel's failure to object to these alleged errors.

Lastly, defendant argues that the court erred in ordering that he pay restitution because the victims did not suffer any loss of jewelry. Plaintiff concedes that the evidence at trial confirmed that no jewelry was actually taken during the robbery and that the portion of the sentencing order referring to restitution for the jewelry should be struck. We agree.

However, defendant asserts in his argument on appeal that he should not be required to pay *any* restitution. Defendant's argument presupposes that restitution was ordered solely to compensate for the loss of jewelry. But the sentencing court ordered that defendant pay "restitution in the amount of the value of the jewelry taken to Jonetta Cann" *and* pay restitution to Gary Jackson in the amount of $200 as compensation for money taken during the robbery. At

the beginning of sentencing, defendant noted that the presentence investigation report was incorrect in stating that Jackson was "out $800." Defendant asserted that the correct amount was $270 "[b]ecause that's the amount he [defendant] received from Mr. Jackson." Therefore, there is no basis for disturbing the sentencing court's restitution order with respect to Jackson, an amount that was actually lower than what defendant claimed it should be. But we remand this case for the ministerial task of vacating that portion of the judgment that orders "additional restitution for value of jewelry."

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra